In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
Petitioner

vs.

MIDCAL ALUMINUM, INC., a California corporation,
Respondent

BAXTER RICE, as Director of the Department of
Alcoholic Beverage Control of the State of California
Respondent

On Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a state prevented by the Sherman Act from requiring fair trade pricing for purely intrastate sales of alcoholic beverages by wholesale and retail licensees, particularly in view of the *Parker v. Brown* "state action" exemption?

2. Did Congress intend by repeal of the Miller-Tydings and McGuire Acts to have any effect on a state's right to

regulate wholesale and retail fair trade pricing practices of its intrastate alcoholic beverage licensees?

3. Aside from the *Parker v. Brown* "state action" exemption, does a state have a plenary right under the Twenty-first Amendment to require fair trade pricing practices for the purely intrastate sales of alcoholic beverages by wholesale and retail licensees?

STATUTES INVOLVED

California Constitution, Article XX, Section 22
California Business and Professions Code
Sections 24755, 24862, 24866

(Because of the length of the text, these sections are printed in the Appendix to this brief.)

SUMMARY OF ARGUMENT

Only one year ago, the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board* (*Rice*), 21 Cal.3d 431 (1978), relying entirely on federal grounds, struck down longstanding state statutes requiring and regulating intrastate "fair trade" retail price maintenance practices for the sale of distilled spirits. The asserted ground of the Court's decision was that the statutes in question ". . . violate[d] the policy underlying the Sherman Act." (15 U.S.C. § 1 et seq.)

In four strongly worded prior decisions, the same Court had upheld the state's liquor fair trade laws. The reason for this abrupt turnabout was the indicated belief of the California Court that fair trade was an outmoded concept which was no longer in the public interest; that it had failed to achieve the legislative purposes of temperance

and orderly marketing conditions; and that fair trade laws generally were against public policy, not only in California, but throughout the United States. The decision was reached in spite of the fact that earlier the California Legislature had repealed all the state's fair trade laws except those relating to alcoholic beverages.

To buttress this judicial legislation, the California Supreme Court concluded that its prior decisions upholding the state's liquor fair trade retail price maintenance statutes were only justified because of the existence of the federal Miller-Tydings Act, which act excepted from the provisions of the Sherman Act minimum pricing contracts for certain commodities in interstate commerce, if lawful under state law, and the McGuire Act, which act permitted so-called "nonsigner contracts" binding all retailers to the minimum prices agreed to by any retailer contracting with a wholesaler. The Court held that with the repeal of those acts the justification for liquor fair trade laws had disappeared, leaving only the Sherman Act which now operated to prohibit the conduct permitted before repeal.

In *Rice,* the California Supreme Court discounted the language of the Senate Judiciary Committee's report on the repealing legislation and totally ignored the House Committee's report which expressly stated that by repeal of the Miller-Tydings and McGuire Acts Congress did not intend to ". . . impinge in some fashion upon the power of States to regulate liquor traffic under the second section of the Twenty-first Amendment . . ." and that "[t]he repeal would terminate the power of liquor manufacturers to set resale prices under a general 'fair trade' statute, but would leave unimpaired whatever power the States have under the

Twenty-first Amendment to regulate the importation of liquor from outside the state." (H. Rep. No. 94-341, p. 3, fn. 2 (1975).)

Once reaching the erroneous conclusion that repeal of Miller-Tydings and McGuire required a reexamination of the law relating to liquor fair trade statutes, the California Supreme Court determined (1) that the *Parker v. Brown,* 317 U.S. 341 (1942) "state action" exemption doctrine was no longer viable; and (2) that the Sherman Act took precedence over a state's right to regulate purely intrastate liquor sales under the Twenty-first Amendment.

Each of these conclusions is incorrect.

For over 30 years, since the rendering of this Court's decision in *Parker v. Brown,* in 1942, no United States Supreme Court case which has in any way discussed the state action exemption has reached the result attained by the California Supreme Court in *Rice.* To the contrary, wherever action by a state has been directly challenged by a private party, the state action exemption has been applied to sustain the state's position. This is particularly evident in cases such as *Goldfarb,*[1] *Bates,*[2] and *New Motor Vehicle Board.*[3]

Similarly, when the Twenty-first Amendment is balanced against the Commerce Clause or other constitutional language, frequently, but not always, the states' powers under the Twenty-first Amendment must yield. It is fallacious, however, to compare the Sherman Act, a statute

[1]*Goldfarb v. Virginia State Bar,* 421 U S. 773 (1975).

[2]*Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

[3]*New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96 (1978).

enacted under the Commerce Clause, with an express constitutional provision such as the Twenty-first Amendment. The Sherman Act is not paramount to the state's power to require its liquor licensees to comply with its fair trade statutes enacted under the Twenty-first Amendment.

In *Midcal Aluminum, Inc. v. Rice* (*Midcal*), 90 Cal.App. 3d 979 (1979), to which the instant Writ of Certiorari is directed, the Court of Appeal, an inferior California court, necessarily had no choice but to follow the California Supreme Court's *Rice* holding, setting aside the state's fair trade distilled spirits laws. Therefore, since the Court of Appeal could find no independent basis for distinguishing the state's wine fair trade pricing laws at either the wholesale or retail level, it was required to strike down those statutory provisions on the same theory. Because *Rice* was wrongly decided, the Court of Appeal's *Midcal* decision is equally so and must be reversed.

STATEMENT OF THE CASE

Background

Since 1932, the Constitution of California has provided that the state, ". . . subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages."[4]

[4]California Constitution, article XX, section 22.

In that same part of the California Constitution, the Department of Alcoholic Beverage Control (Department) is given exclusive power, subject to language contained in the Constitution and statutes which may be enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in the state.

Pursuant to these constitutional provisions, the California Legislature enacted the Alcoholic Beverage Control Act.[5]

Section 24755[6] of that act requires that a manufacturer or brand owner file with the Department a minimum price schedule for distilled spirits which bears the brand name of the owner. The section also prohibits an offsale retail licensee from selling at less than the prescribed price.[7]

In *Rice v. Alcoholic Beverage Control Appeals Board (Rice),* 21 Cal.3d 431 (1978),[8] the California Supreme Court held that ". . . the price maintenance provisions embodied in section 24755 clearly violate the policy underlying the Sherman Act [15 U.S.C. § 1 et seq.]" (21 Cal.3d at p. 456.) The Court reached its conclusion through a balancing process of the Sherman Act's purpose in encouraging ". . . free and unfettered competition as the rule of

[5]Business and Professions Code section 23000 et seq.

[6]Business and Professions Code.

[7]Initially, California only permitted resale price maintenance by contract between a retailer and a wholesaler. (Stats. 1931, ch. 278, p. 583.) In 1933, a nonsigner provision was enacted. In 1961, Business and Professions Code section 24755 was amended to allow control of the price of liquor by means of the filing with the Department of a minimum retail price which had to be followed by all retailers.

[8]Printed in full in Appendix C to Petition for Certiorari herein.

trade . . ."[9] against ". . . the Legislature's assumption that the price maintenance provisions would promote temperance and orderly marketing conditions. . . ."[10] This balancing process led the court to find that the statute in question did not live up to the legislative aspirations;[11] that fair trade laws were no longer socially desirable but now contrary to public policy,[12] and ". . . that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act."[13]

The Instant Case

Following *Rice,* the Court of Appeal in *Midcal Aluminum, Inc. v. Rice, (Midcal), supra,* 90 Cal.App.3d 979, 983, summarized the relevant statutes before the Court as follows:

> "Under [California] Business and Profession Code section 24862 no licensee may sell or resell to a retailer, and no retailer may buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to sell or resell to any consumer any item of wine at less than the selling or resale price

[9]*Rice, supra,* p. 453, quoting from *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4-5 (1958).

[10]*Rice, supra,* p. 453.

[11]*Rice, supra,* page 458.

[12]*Rice, supra,* page 458.

[13]*Rice, supra,* page 459: "In sum, we find that the policies underlying the Sherman Act are clearly violated by the liquor price maintenance laws, and that on the other side of the balance there is doubt whether such laws promote temperance, there is a clear national trend against fair trade laws, and there exist means other than mandatory price fixing to achieve the ends which those laws seem to attain. We conclude, therefore, that the policies underlying the Sherman Act must prevail, and that the price maintenance provisions embodied in section 24755 are invalid."

> contained in an effective price schedule or fair trade contract. Under section 24866 each grower, wholesaler, wine rectifier or rectifier must make and file fair trade contracts and/or file schedules of the resale prices of wines."

An accusation was filed against an alcoholic beverage license held by Midcal Aluminum, Inc. (Midcal) by the California Department of Alcoholic Beverage Control (Department) charging that Midcal sold to a licensed retailer 27 cases of wine at prices less than the selling prices contained in the effective price schedule filed with the Department by the E & J Gallo Winery. A second count charged that Midcal had sold to certain retailers wine for which there was no effective fair trade contract duly filed with the Department. Midcal stipulated to the truth of the facts set forth in the accusation.

The Department and Midcal entered into a further stipulation that subject to a judicial determination of the constitutionality of the statutory wine price posting and fair trade requirements, the Department could impose a monetary penalty or license suspension against Midcal as provided by statute.

Midcal then filed a petition for a writ of mandate in the California Court of Appeal, Third Appellate District, to review the exercise of the quasi-judicial power of a constitutionally authorized statewide agency, the Department.

The Court in due course released its decision, the subject of the instant Writ of Certiorari, ordering that a peremptory writ of mandate issue directing the Department to refrain from enforcing the wine fair trade and

price posting provisions of the California Alcoholic Beverage Control Act.

The Court's rationale was that the statutes and regulations relating to price maintenance of wine challenged in the proceeding bore ". . . no significant differences to the statutes and regulations relating to price maintenance of distilled spirits found to be invalid in *Rice v. Alcoholic Beverage Control Appeals Board, supra,* 21 Cal.3d 431", and that there is no independent basis for upholding the fair trade laws relating to wine. Because it is an inferior court to the California Supreme Court, the Court of Appeal was necessarily bound to follow the *Rice* decision.[14]

Both a petition for rehearing in the Court of Appeal and a petition for hearing in the California Supreme Court, brought by intervenor California Retail Liquor Dealers Association (CRLDA) (petitioner herein), were denied.

Although the instant petition necessarily seeks to overturn the Court of Appeal's *Midcal* decision concerning fair trade pricing statutes for wine, such reversal will also have the obvious consequence and effect upon the California Supreme Court holding in *Rice* which treated fair trade pricing of distilled spirits. Because *Rice* was so pivotal to a resolution of *Midcal*, this brief must necessarily be directed to the *Rice* decision.

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[14] *Midcal, supra,* 90 Cal.App.3d 979 at p. 984.

ARGUMENT

I

THE CALIFORNIA ALCOHOLIC BEVERAGE FAIR TRADE STATUTES ARE VALID UNDER THE PARKER V. BROWN EXEMPTION TO THE SHERMAN ACT

Parker v. Brown, supra, 317 U.S. 341, held that a state statute authorizing a state commission to administer an agricultural marketing program which purposively tended to restrict competition among state raisin growers was exempt from the proscriptions of the Sherman Act. The Court said:

> ". . . We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations (§ 7), and it authorizes suits under it by persons and corporations (§ 15). A state may maintain a suit for damages under it, *Georgia v. Evans,* 316 U.S. 159, but the United States may not, *United States v. Cooper Corp.,* 312 U.S. 600—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the

> subject matter, the context and the legislative history of the statute.
>
> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong.Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. [Citing cases.]
>
> " . . .
>
> "[I]n view of the latter's words and history, it must be taken to be a prohibition of individual and not state action." (*Parker, supra,* at pp. 350-352.)

Parker v. Brown was based partly on *Olsen v. Smith,* 195 U.S. 332, 344-345 (1904), and *Lowenstein v. Evans,* 69 F. 908, 910 (1895) (C.C.D.S.C.). In *Olsen,* one of the issues involved the question of whether Texas pilotage laws conflicted with the antitrust laws enacted by Congress. The Court upheld the Texas statutes stating that a judicial remedy would not lie to enjoin state conduct in those cases in which the state " . . . has plenary power until Congress has seen fit to act in the premises." (*Olsen, supra,* at p. 345.)

In any case such as the instant one wherein the federal antitrust laws must be tested against a state statute regulating intrastate alcoholic beverage sales, it is necessary to consider at least four different issues relating to the *Parker v. Brown*[15] "state action" exemption.

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[15] *Parker v. Brown, supra,* 317 U.S. 341 (1942).

1. Is true "state action" involved?

2. Is such action within the *Parker v. Brown* exemption to the Sherman Act?

3. Is the statute being directly attacked by a private party charged with violation thereof?

4. Is the statute being attacked in an action for damages by or against a private party?

Here, true state action is involved; such state action is within the *Parker v. Brown* exemption to the Sherman Act; the statute is being directly attacked by a private party charged with its violation; and the statute is not being attacked in an action for damages by or against a private party.

A. True State Action is Involved in The Instant Case

The California Alcoholic Beverage Control Act involved herein, providing for fair trading of alcoholic beverages at wholesale and retail levels, is true state action.

In the instant case, statutes have been enacted pursuant to state constitutional mandate by a state legislature; certain conduct is demanded of state alcoholic beverage licensees; enforcement is by a state agency; and a licensee of the agency is contesting a disciplinary action for violation of said statutes. Every required element of state action is present within the confines of the facts of this case.

B. The State Action in The Instant Case Is Fully Within the Parker v. Brown Exemption To The Sherman Act

Of all the state action cases which have reached this Court, whether the *Parker v. Brown* exemption to the

Sherman Act issue is merely touched on[16] or deeply explored, not one has ever hinted at any softening of the doctrine where direct action by the state, such as in the instant case, is being challenged.[17] To the contrary, each succeeding case has resulted in stronger support of true state action.

In *Hitchcock v. Collenberg,* 140 F.Supp. 894 (D. Md. 1956), *aff'd per curiam,* 353 U.S. 919 (1957), the Court refused to accept the argument of a group of naturopaths that the Maryland State Medical Practice Act violated the antitrust laws. The Court by its affirmance approved the holding of the District Court that:

> "[T]he complete answer to this contention is that the anti-trust laws deal with individual activity and not with state activity, *Parker v. Brown,* 317 U.S. 341, [citations omitted]; whereas all of the matters charged in the complaint as violative of the anti-trust laws are regulations prescribed by the Maryland legislature." (*Hitchcock, supra,* at p. 902.)

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), the Court held that the publicity campaign of a group of railroads to obtain governmental action adverse to truckers was not illegal because it may have been affected by an anticompetitive purpose. The Court stated at pages 135-136:

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[16]In *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 389 (1951), there is a passing reference to the caveat in *Parker v. Brown, supra,* 317 U.S. at pages 351, 353, that ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."

[17]For comprehensive collections of United States Supreme Court and lower court cases, see student notes in 77 Colum. L.R. 898 (1977) and 29 Hast.L.J. 211 (1977).

". . . It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. of New Jersey v. United States* that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." (Footnote and citations omitted; last sentence citing to *Parker v. Brown, supra,* 317 U.S. 341.)

Five more recent cases have gone into the state action exemption in greater depth: *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96 (1978).

The Court has set forth approximately 20 factors in these cases which may be utilized to determine in any given instance whether the *Parker v. Brown* state action exemption is applicable. Significantly, the instant case comports with each test. By every recognized standard the instant case is within the state action exemption.

Goldfarb, supra, advises that:

1. The state action must be ". . . required by the State acting as sovereign." (421 U.S. 773, at p. 790.)

2. The anticompetitive activities must be compelled by direction of the state acting as sovereign. (421 U.S. 773, at p. 791.)

3. The state cannot be joined with a private organization in the anticompetitive activity. (421 U.S. 773, at p. 792.)

4. The state must have a direct interest in the regulation and it must be necessary to achieve the state's purpose. (421 U.S. 773, at p. 792.)

5. The state should also probably have a great interest in regulating the activity. (421 U.S. 773, at p. 792.)

The action involved here, alcoholic beverage fair trade pricing practices, is a specific statutory requirement enacted under the direct aegis of the California Constitution; any anticompetitive effects of the pricing requirements are compelled by the language of the statutes; the state is not acting in concert with the licensee, but is directing the licensee's conduct; the state Constitution gives the Legislature the exclusive right to regulate the sale of alcoholic beverages in the state and has given the Director of the Department of Alcoholic Beverages the exclusive power to discipline licensees for conduct contrary to public welfare or morals; the constitutional language shows the great interest the state has in regulating the activity. Every *Goldfarb* test has been met.

Cantor, supra, adds these factors:

1. The ultimate responsibility for the anticompetitive activity should rest upon the state so that it is the real party in interest defendant. (428 U.S. 579, at p. 591.)

2. The private party under regulation cannot exercise sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his action. (428 U.S. 579, at p. 593.)

3. The private party cannot have any option to perform or not in accordance with the regulation. (428 U.S. 579, at p. 594.)

4. The state must have an independent regulatory interest in the subject matter of the regulation. (428 U.S. 579, at pp. 584-585.)

5. The regulation should be justified by circumstances such as flaws in the competitive market. (428 U.S. 579, at pp. 584-585.)

6. The regulation should implement some statewide policy relating to the subject matter of the regulation. (428 U.S. 579, at p. 585.)

7. Exemption from the Sherman Act must be essential to the state's regulation of the subject matter. (428 U.S. 579, at p. 597.)

8. The program cannot be instigated by the party regulated. (428 U.S. 579, at p. 591.)

Again, as in *Goldfarb,* each factor listed in *Cantor* is directly applicable to the instant case.

Bates, supra, derives from *Cantor* the alternative requirement to justification of an anticompetitive regulatory program that it should be in response to health or safety concerns. (433 U.S. 350, at p. 361.) It also adds new factors:

1. The challenged restraint should result from the affirmative command of the highest state authority. (433 U.S. 350, at pp. 360-361.)

2. The regulation must be at the core of the state's power to protect the public. (433 U.S. 350, at p. 361.)

3. The program cannot be instigated by the private party with only the acquiescence of the state's regulatory body (the action required must be mandatory). (433 U.S. 350, at p. 362.)

4. The regulation should reflect a clear articulation of the state's policy with regard to the required behavior. (433 U.S. 350, at p. 362.)

5. The state should be actively supervising the program. (433 U.S. 350, at p. 362.)

The *Goldfarb* tests are met here; the *Cantor* tests are met; and the *Bates* test are met. Every factor is totally satisfied in the circumstances of the instant case.

Lafayette, supra, concludes that local governments such as cities are not covered by the *Parker v. Brown* state action exemption.

And *New Motor Vehicle Board, supra,* holds that even if a state scheme gives effect to privately initiated restraints on trade, it is still valid under the *Parker v. Brown* state action exemption.

In *New Motor Vehicle Board, supra,* 439 U.S. 96 the Court said at page 109:

> "Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. § 1 *et seq.* [Footnote omitted.] They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and

thus is invalid under *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951).

"The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption. *Parker v. Brown,* 317 U.S. 341 (1943); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). See also *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978).

". . . .

"Appellee's reliance upon *Schwegmann Bros. v. Calvert Distillers Corp., supra,* is misplaced. In *Schwegmann,* the State attempted to authorize and immunize private conduct violative of the antitrust laws. California has not done that here. Protesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965). [Footnote omitted.]

"Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition. 'This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the

Sherman Act—"our charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.' *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133 (1978)." (*New Motor Vehicle Board, supra,* 439 U.S. 96, at pp. 109-111.)

In the instant case, a state regulated alcoholic beverage licensee is attempting to overturn a state statute expressly requiring certain conduct (fair trade practices) which, except for the *Parker v. Brown* state action doctrine, might otherwise be in violation of the Sherman Act's antitrust proscriptions.

Mere reference to the foregoing criteria enunciated in *Parker v. Brown* and its progeny leads to the ineluctible conclusion that a proper state action exemption exists here. The California Constitution and the relevant alcoholic beverage statutes enacted thereunder are unequivocal. By them the state, through the Department of Alcoholic Beverage Control, imposes a restraint on the alcoholic beverage licensee as an act of government. The activity which is regulated, the pricing of alcoholic beverages at wholesale and retail levels, is required and compelled by the state acting as sovereign. The state is not party to any contract or agreement and has entered into no conspiracy in restraint of trade or to establish monopoly, but as sovereign has enforced the restraint (alcoholic beverage fair trade regulations) as an act of government which the Sherman Act did not undertake to prohibit. The state has a direct interest in the regulated activity and it is necessary to

achieve the state's purposes of regulating commerce in alcoholic beverages and protection of public welfare and morals. The licensee regulated has no control over the statutory requirement and has no option whether or not to comply with the law. The regulation is at the core of the state's power to protect the public. The state actively supervises and enforces the program.

C. The Matter Here Regulated, Alcoholic Beverage Fair Trade Laws, is Relevant to the Question of Relationship of the Parties to this Lawsuit

Of significance here is the nature of the judicial proceedings which have brought this case and, indirectly, *Rice, supra,* before the Court.

State licensed alcoholic beverage dealers charged with fair trade violations of the California Alcoholic Beverage Control Act seek to set aside resultant disciplinary penalties on the ground that the regulatory statutes violate the Sherman Act.

Cantor, supra, and *Bates, supra,* clearly stand for the proposition that the Sherman Act may not be validly pleaded as a defense by these private litigants in this case. In *Bates,* the Court said:

> "We believe, however, that the context in which *Cantor* arose is critical. First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.[13] Here, the appellants' claims are against the State. The

"13. MR. JUSTICE STEVENS, in a portion of his opinion in Cantor that was joined by BRENNAN, WHITE and MARSHALL, J.J., observed that *Parker v. Brown* was a suit against

> Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson,* 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision." (*Bates v. Arizona, supra,* 433 U.S. 350, at p. 361.)

The question of the relationship of the parties to a lawsuit was expressed in a different way by the California Supreme Court in two of the four cases[18] prior to *Rice,* where it had upheld the constitutionality of the state's alcoholic beverage fair trade statutes.

In *Samson Market,* 71 Cal.2d 1215 at pp. 1219-1220, the Court said, quoting from *Wilke & Holzheiser:*

> ". . . The power we analyze here finds expression in the private act of the producer in entering into a contract setting a price for the resale of his own brand. . . . *To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the crucial distinction between the fixing of a price for* **all** *products in a given market and the setting by the producer of the retail price at which* **his** *own product is to be*

public officials, whereas in *Cantor* the claims were directed against only a private defendant. 428 U.S., at 585-592, 600-601. The dissenters in *Cantor* would have applied the state-action exemption regardless of the identity of the defendants. (*d.* at 615-617. STEWART, J., joined by POWELL and REHNQUIST, J.J.)."

[18] *Allied Properties v. Department of Alcoholic Beverage Control,* 53 Cal.2d 141 (1959); *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349 (1966); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board,* 71 Cal.2d 1215 (1969); *Big Boy Liquors Ltd. v. Alcoholic Beverage Control Appeals Board,* 71 Cal.2d 1226 (1969).

sold. (Original italics.) (*Id.* at pp. 365-366.) "(Emphasis added.)

Because the state is here requiring a licensee to comply with its alcoholic beverage pricing requirements by stating the price at which its products should be sold, a protected act under the *Parker v. Brown* state action exemption, the licensee cannot validly urge the Sherman Act as a defense to an administrative disciplinary action.

II

REPEAL OF THE MILLER-TYDINGS AND McGUIRE ACTS DID NOT AFFECT THE VALIDITY OF STATE FAIR TRADE LAWS RELATING TO ALCOHOLIC BEVERAGES

In *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 456 et seq. (1978), progenitor of *Midcal Aluminum, Inc. v. Rice,* 90 Cal.App.3d 979 (1979), to which the instant writ of certiorari is directed, the California Supreme Court concluded that the repeal of the Miller-Tydings Act[19] which excepted from the provisions of the Sherman Act minimum pricing contracts for commodities in interstate commerce if lawful under state law, and the McGuire Act[20] which permitted so called "nonsigner contracts" binding all retailers to the minimum prices agreed to by any retailer contracting with a wholesaler, by the Consumer Goods Pricing Act of 1975[21] made the Sherman Act directly apply to California's alcoholic beverage pricing requirements and that those requirements were now

[19]50 Stat. 693 (1937).
[20]66 Stat. 631 (1952).
[21]89 Stat. 801 (1975).

invalid "state action" in the alcoholic beverage pricing regulation area.

In four previous cases, the California Supreme Court upheld the California alcoholic beverage price regulation statutes at both the wholesale and retail levels.[22]

By the time the California Supreme Court issued its decision in *Rice, supra,* however, it had concluded that the fair trade concept was no longer socially desirable. Finding itself shackled with its own strongly worded opinions upholding fair trade in these four cases, it had to find some escape hatch to justify a total change in position. Hence, it developed the repeal of Miller-Tydings and McGuire theory.

Significantly, the California Court never really showed that these two acts were ever applicable; rather, the court rationalized that their repeal per se indicated fair trade was an outmoded concept, and since alcoholic beverages was the last fair trade category left in California, it too should go. (*Rice, supra,* 21 Cal.3d 431, 447-450.)

To reach this result, the California Supreme Court discounted the report of the Senate Judiciary Committee[23] recommending repeal of *Miller-Tydings* and *McGuire* which expressly stated that repeal of these acts would not affect instrastate regulation of liquor. The Court referred to the following language in the Senate Report:

> ". . . Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the Twenty-first Amendment to the Constitution

[22]See footnote 18 herein.
[23]S. Rep. No. 94-466 (1975).

gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-first Amendment. (1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)"[24]

(*Rice, supra,* 21 Cal.3d at pp. 445-446; fn. 8.)[25]

Commenting on this excerpt, the California Supreme Court stated in *Rice, supra,* at pp. 445-446:

". . . This statement in the report represents only an opinion that the Twenty-first Amendment will allow continuation of price fixing for liquor in those states which properly allow such conduct. . . . We do not view this opinion as a declaration of antitrust policy. There is a 'heavy presumption against implicit exemptions' to the Sherman Act (*Goldfarb, supra,* 421 U.S. 773, at p. 787 [citations omitted]), and we conclude that the statement in the Senate report relied upon by the department does not allow us to read into the Sherman Act an exemption for liquor fair trade provisions which the act itself does not contain."

The Court's disclaimer ignored another and even more specific report filed by the House of Representatives relative to the same statutes. The House document reads in pertinent part:

"2. Some concern was expressed in hearings before the subcommittee that the repeal of Miller-Tydings and McGuire might impinge in some fashion upon the power of States to regulate liquor traffic under the

[24]S. Rep. No. 94-466, page 2 (1975).

[25]Another reference was made to the Senate report in *Rice, supra,* at page 456, footnote 21. This reference related to the economic effects of presence or absence of fair trade.

second section of the 21st amendment. *No such effect is intended. The repeal would terminate the power of liquor manufacturers to set resale prices under a general 'fair trade' statute, but would leave unimpaired whatever power the States have under the 21st amendment to regulate the importation of liquor from outside the State."* (Emphasis added.) (Report of the House Committee on the Judiciary on the Consumer Goods Pricing Act of 1975, 94th Congress, 1st Session, Report No. 94-341, July 9, 1975, page 3, footnote 2.)

The importance of the House Report increases greatly when it is noted that the Senate and House reports were both referring to identical bills, Senate Bill S-408 and House Bill H.R. 6971. In fact, the Senate Judiciary Committee actually substituted H.R. 6971 for S. 408 when it was sent to the floor of the Senate for passage.[26]

Senate and House Committee reports ". . . may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure." (*Duplex Printing Press Company v. Deering,* 254 U.S. 433, 474 (1921).

Had the California Supreme Court, in *Rice,* considered the reports of both houses of Congress it would have had extreme difficulty in justifying its premise that the repeal of Miller-Tydings and McGuire Acts meant state alcoholic beverage fair trade laws were no longer viable. That premise failing, the entire opinion of the California Supreme Court in *Rice* necessarily falls for lack of substance.

[26]121 Cong. Rec. 38049 (1975) (remarks of Sen. Brooke).

III

THE TWENTY-FIRST AMENDMENT MUST BE BALANCED AGAINST THE COMMERCE CLAUSE ITSELF, NOT AGAINST STATUTES SUCH AS THE SHERMAN ACT WHICH ARE ENACTED UNDER THE COMMERCE CLAUSE

It is axiomatic that constitutional interpretation requires that each part of the Constitution necessarily has the same dignity as any other part. (*Richardson v. Ramirez*, 418 U.S. 24, 25 (1974).) Or, more succinctly:

> "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." (*Ullman v. United States*, 350 U.S. 422, 428 (1956).)

In *Dick v. United States,* 208 U.S. 340 (1908), this Court balanced the right of a state to have ". . . full complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the federal Constitution or by its own constitution" against the expressed constitutional congressional power to regulate commerce with Indian tribes. In the instant case the Court should similarly balance the state's right to control its intrastate alcoholic beverage trade under the Twenty-first Amendment with the congressional right to regulate interstate commerce.

Where it is necessary to compare and to weigh different provisions of the Constitution, the Court should do so without nullifying or substantially impairing one or the other. (*Dick, supra*, at p. 353.)

Mr. Justice Frankfurter's Concurring Opinion in *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 282 (1945)

puts the instant controversy between the Twenty-first Amendment and the Sherman Act in its proper perspective.

> "As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. If an agreement among local dealers not to buy liquor through channels of interstate commerce does not offend the Sherman Law though a like agreement as to other com-

modities would, an agreement among liquor dealers to abide by state policy for a uniform price—which is far less restrictive of interstate commerce than a comprehensive boycott—can hardly be a violation of Sherman Law." (Pp. 300-301.)

Thus, in *Seagram and Sons v. Hostetter*, 384 U.S. 35, 42 (1966), the Court started with the proposition that where the ". . . case concerns liquor destined for use, distribution, or consumption in the State . . . the Twenty-first Amendment demands wide latitude for regulation by the State." In this context, the Court tested the New York liquor price affirmation statute against the Commerce Clause, finding no undue burden; against the Supremacy Clause, finding no clear conflict between state and federal law; against an argument that the state statute was void for vagueness; and against the Equal Protection Clause, finding no invidious discrimination. The Court also upheld the statute under the Due Process Clause of the Fourteenth Amendment, first emphasizing the principle that such clause should not be used to strike down laws which may be considered by courts rather than state legislatures to be socially undesirable, and second, that in any event the New York law was not unreasonable.

In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964), the comparison of the Twenty-first Amendment against the express constitutional authority given to Congress to regulate commerce with foreign nations led to the holding that New York could not tax sales of liquor destined directly for foreign commerce. (377 U.S. 324 at p. 334.) There the Court set forth the extent of the relationship of the Twenty-first Amendment to other parts of the Constitution:

> "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. Thus, in upholding a State's power to impose a license fee upon importers of beer, the Court pointed out that '[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, . . . because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide.' (*State Board v. Young's Market Co.*, 299 U.S. 59, 62.) In the same vein, the Court upheld a Michigan statute prohibiting Michigan dealers from selling beer manufactured in a State which discriminated against Michigan beer. *Brewing Co. v. Liquor Comm'n,* 305 U.S. 391. 'Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. . . .' Id., at 394. See also *Finch & Co. v. McKittrick,* 305 U.S. 395.
>
> "This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.
>
> " . . . .
>
> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow oper-

ated to repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd over-simplification. If the Commerce Clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

" . . . .

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." (*Hostetter v. Idlewild Liquor Corp., supra,* 377 U.S. 324 at pp. 330-332.)[27]

An additional example where one part of the Constitution is balanced against another in Twenty-first Amendment cases is *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) where a state requirement that the names of known excessive drinkers had to be posted in retail liquor outlets gave way to the Due Process Clause of the Fourteenth Amendment.

Craig v. Boren, 429 U.S. 190 (1976), which involved different drinking ages for men and women in Oklahoma, primarily concerned the Twenty-first Amendment as it related to the Equal Protection Clause. There, the Court discussed

[27]See also, *National Railroad Passenger Corporation v. Miller,* 358 F.Supp. 1321 (D. Kan. 1973) affd. on app. 414 U.S. 948 (1973) and *National Railroad Passenger Corporation v. Harris,* 490 F.2d 572 (10th Cir. 1974), disregarded as authority by the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board, supra,* 21 Cal.3d 431, 450, fn. 11.

the question of the "strength" of one part of the Constitution over another. Citing *California v. La Rue,* 409 U.S. 109 (1972), the Court stated:

> ". . . the Court has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause." (*Craig, supra,* at p. 207.)

La Rue, supra, involved the balancing of Twenty-first and First Amendment rights in the context of alcoholic beverage regulations governing nudity and films in licensed premises. The argument that entertainment as a means of artistic expression should always be protected under the First and Fourteenth Amendments gave way to the Twenty-first Amendment right of the states to regulate the manner and conditions under which alcoholic beverages are dispensed by state licensees. *La Rue* considered the state regulations ". . . in a context of licensing bars and nightclubs to sell liquor by the drink . . ." rather than in the context of a dramatic theatrical performance. (*La Rue, supra,* 409 U.S. 109 at p. 114.)

There the Court said:

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad scope of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. In *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amend-

ment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still earlier, the Court stated in *State Board v. Young's Market Co.*, 299 U.S. 59, 64 (1936):

"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.

"These decisions do not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. . . . But the case for upholding state regulation in the area covered by the Twenty-first amendment is undoubtedly strengthened by that enactment. . . ." (*California v. La Rue, supra,* 409 U.S. 109 at pp. 114-115.)

Another indication that even "Bill of Rights" protections may occasionally give way to a state's power to regulate its business licensees is found in *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978). There the Court, though declaring invalid broad enforcement activities of agents of the Secretary of Labor to search the work area of any employment facility within the jurisdiction of the Occupational Safety and Health Act, nevertheless recognized that there might still even be exceptions to the Fourth Amendment's protections in the case of longtime and closely regulated industries. At page 313, the Court said:

"The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business[es]' *United States v. Biswell,* 406 U.S. 311, 316 (1972), and for 'closely regulated' industries 'long subject to close supervision

and inspection.' *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 74, 77 (1970). These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz v. United States,* 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

"Industries such as these fall within the 'certain carefully defined classes of cases,' referenced in *Camara, supra,* at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. 'A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.' *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973)."

In the foregoing illustrations, when the Twenty-first Amendment was compared to other parts of the Constitution, language of equal but mutual import was balanced. If one clause appeared to exclude another, or if the two were totally irreconcilable, the relevant or dominant one which had a "stronger" impact was preferred. In none of these cases, however, was any statutory language ever

deemed paramount to the constitutional phraseology with its concomitant powers.

If the Twenty-first Amendment is to be compared to the Sherman Act, it would only be possible to do so if some direct Commerce Clause question was presented.

In the instant case, there are no problems of due process, equal protection, freedom of expression, interstate commerce, foreign commerce, or Indian commerce. Here, the Court is presented with a purely intrastate issue with no such constitutional implications. Under such circumstances, the state's right to control its alcoholic beverage trade under the Twenty-first Amendment must prevail over any defense that the Sherman Act is applicable.

CONCLUSION

From the foregoing, it is readily discernible that the California Supreme Court grossly erred in its analysis in *Rice v. Alcoholic Beverage Control Appeals Board, supra,* 21 Cal.3d 431 (1978) when it declared California's distilled spirits fair trade pricing statutes invalid on the ground they were incompatible with the policy underlying the Sherman Act.

In its zeal to eliminate fair trade, contrary to the expressed wishes of the California Legislature, the Court turned away from the solid legal analysis in four of its own prior cases upholding California alcoholic beverage wholesale and retail price maintenance practices and substituted in lieu thereof a conclusion totally contrary to clearly enunciated pronouncements by the Supreme Court of the United States.

Starting with the sociological premise that fair trade in any form is an anathema, the California Supreme Court looked for a magic talisman to utilize in combating the evil it felt still existed in the state. The decision was reached in the face of the California Legislature's determination that although other fair trade laws had been repealed, alcoholic beverage fair trade statutes should remain in effect.

Congressional repeal of the Miller-Tydings and McGuire Acts had only recently occurred when *Rice* was decided. And even though both the Senate and House committee reports clearly demonstrated a specific congressional intent that the repeal of these statutes would have no diminishing effect on the power of the states to regulate intrastate alcoholic beverage traffic under the Twenty-first Amendment, the California Supreme Court chose not to follow that admonition.

Instead, it proceeded to reevaluate its former legal position and reexamined both the *Parker v. Brown* "state action" exemption to the Sherman Act, concluding that it was no longer applicable. Examining the cases interpreting state powers under the Twenty-first Amendment, the Court concluded that state power to control intrastate alcoholic beverage pricing practices no longer had any viability.

The California Supreme Court erred completely in all three premises. Repeal of the Miller-Tydings and McGuire Acts had no effect on the state's rights to control intrastate alcoholic beverage prices; the *Parker v. Brown* state action exemption to the Sherman Act exists even stronger than ever before; and the other constitutional limitations

which may curtail a state's Twenty-first Amendment powers still leave fully intact the state's power to control the manner and method of alcoholic beverage pricing by its licensees within the state.

Of course, *Rice v. Alcoholic Beverage Control Appeals Board* is long since final. The decision of this Court herein will not directly affect the parties to that case. But *Midcal Aluminum, Inc. v. Rice,* the case to which the instant Writ of Certiorari has been directed by this Court, is based totally and completely on *Rice v. Alcoholic Beverage Control Appeals Board,* which, as discussed above, cannot be supported in logic or in law. For these reasons, the decision of the Court of Appeal in *Midcal* must be reversed.

Respectfully submitted,

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(Appendix A follows)

APPENDIX A

STATUTES INVOLVED

California Constitution, Article XX, Section 22

SEC. 22. The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years

shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in

accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature.

In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

A concurrent resolution for the removal of either the director or any member of the board may be introduced in the Legislature only if five Members of the Senate, or 10 Members of the Assembly, join as authors.

Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section, including, but not limited to, licenses necessary for the manufacture, production, processing, importation, exportation, transportation,

wholesaling, distribution, and sale of any and all kinds of alcoholic beverages.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions.

This amendment shall become operative on January 1, 1957.

California Business and Professions Code Section 24755

§ 24755.

(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisons of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may

be filed separately and differently for the trading area of southern California and the trading area of northern California. The trading area of southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The northern California trading area shall consist of the other counties of the state. No more than one person shall file a schedule for the same package for the same trading area.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed

selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

The department shall reject any price schedule which does not comply with this subdivision.

(e) A price schedule or amendment, change or modification thereof as provided for by this section shall be deemed filed when received, either by personal delivery or mail, at the headquarters office of the department in Sacramento. Upon such filing, a price schedule or amendment, change or modification thereof shall become a public record. Such filing of a price schedule or amendment, change or modification thereof shall constitute constructive notice of its contents to any licensee affected thereby.

(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(g) No retail licensee shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

(h) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has

been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(4) Sales of distilled spirits for use in the manufacture or production of food products which are unfit for beverage use as provided in Section 23112, if such distilled spirits are sold to a person who holds a permit and identification number authorizing the filing of a claim for drawback of federal distilled spirits excise taxes under the Federal Non-Beverage Drawback Regulations.

(i) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer.

(j) The department shall adopt rules whereunder minimum retail prices of distilled spirits will be made available to licensees; means of making such prices available may include, but need not be limited to, publication in trade journals or industry price books of general circulation among retail licensees in this state, or in parts or trading areas of this state.

California Business and Professions Code Section 24862

§ 24862.

No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division, unless otherwise provided in this chapter.

No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made.

California Business and Professions Code Section 24866

§ 24866.

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.